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No. 80-84

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANDERSON BROS. FORD and
FORD MOTOR CREDIT COMPANY,

Petitioners,

vs.

OLGA VALENCIA and
MIGUEL GONZALEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF THE PETITIONERS

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* Anderson Bros. Leasing and Wayne H. Anderson Insurance Agency may be considered affiliates of Anderson Bros. Ford.

**Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. All subsidiaries of Ford Motor Credit Company are either wholly owned by Ford Motor Credit Company or are wholly owned by Ford Motor Credit Company and other subsidiaries of Ford Motor Company. Ford Motor Credit Company may be considered an affiliate of the subsidiaries of Ford Motor Company listed in Appendix C.

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REPLY BRIEF OF THE PETITIONERS

ARGUMENT

Petitioners[1] submit this reply brief to respond to the arguments raised by Respondents. The principal issue in this case is whether the assignment of unearned insurance premiums is a "security interest" required to be disclosed under the Truth in Lending Act (the "Act"). For the first seven years of the Act's relatively short life, no one—lender or borrower—imagined that the Act could be strained to require such disclosure. As demonstrated by the brief filed herein by the credit industry *amici* (the "Industry

[1] The Petitioners, Anderson Bros. Ford and Ford Motor Credit Company, are hereinafter referred to jointly as "Ford Credit", and the Brief of the Petitioners filed herein is referred to as "Ford Br."

Amici"),[2] the credit industry (which deals with security interests as its stock in trade) uniformly has regarded the assignment provision as not being a security interest. The legislative history of the Act, Congressional enactments in the field since adoption of the Act, and recent pronouncements from the staff of the Board of Governors of the Federal Reserve System (the "Board") all support this interpretation of the Act. This Court should confirm it.

I. CONGRESS NEVER INTENDED TO REQUIRE DISCLOSURE OF THE ASSIGNMENT PROVISION.

A. In Order to Ascertain the Intent of Congress, It is Necessary to Look to the Legislative History.

The fundamental objective in construing a federal statute is to ascertain the intent of Congress. *United States* v. *American Trucking Assn.*, 310 U.S. 534, 542 (1940). Yet Respondents make no attempt to ascertain what Congress actually intended; instead, they choose to focus myopically on a word-by-word parsing of the Act and Regulation. To be sure, a question of interpretation does not arise where the language of a statute "is plain and admits of no more than one meaning." (Resp. Br. 8). But that is not the case here. Respondents' "plain language" argument that "any security interest" must be disclosed (Resp. Br. 7) begs the question of whether the assignment provision at issue here *is* a "security interest".[3] The concept of what constitutes a

[2] Brief of the Consumer Bankers Association, General Motors Acceptance Corporation and the National Consumer Finance Association as *amici curiae* ("Industry Br.") at 7-8.

[3] *Compare United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837 (1975) (although definition of "security" in the federal securities laws includes "any . . . stock," shares of stock in a cooperative housing project did not constitute "securities" within the meaning of those laws).

security interest is amorphous and impossible to define with precision. 1 G. Gilmore, *Security Interests in Personal Property* § 11.1, at 334-35 (1965). The courts are divided on this issue (Ford Br. 24, n.9), and a proposed Official Staff Interpretation recently published by the staff of the Board expressly rejects Respondents' reading of the Act. Thus, resort must be had to the legislative history in order to reveal the true Congressional intent in this case. *United States* v. *Donruss Co.*, 393 U.S. 297, 303 (1969).

B. The Legislative History of the Act Demonstrates that Congress Did Not Intend to Require Disclosure of this Incidental Interest.

The overall purpose of the Act—to facilitate comparison shopping for credit by requiring uniform disclosure of credit terms—would be frustrated rather than advanced by requiring the assignment provision to be disclosed as a security interest. (Ford Br. 10, 16-19). It is fundamental that a statute must be construed in accordance with its purpose. *United Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979).

The legislative history of the Act's security interest provision supports this result. That provision was added to the Act as an amendment from the floor of the House of Representatives by Congressman Cahill, who explained that it was designed to prevent certain deceptive practices in credit transactions in which the borrower takes out a second mortgage on his home to secure the loan. This view was echoed in the Senate when the security interest amendment was introduced by Senator Proxmire. (Ford Br. 11-12). No Congressman voiced dissent or suggested that the security interest amendment was intended to require disclosure of less fundamental interests. This Court has consistently given "substantial weight" to such un-

challenged statements by an amendment's sponsor on the floor of Congress.[4] *Federal Energy Admin.* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

When these statements are read in conjunction with the Act's purpose of permitting consumers to comparison shop for credit, it is clear that the security interest provision was added to the Act so that a borrower would be told when he was putting such critically important interests as his home at risk if he should fail to repay the loan. Thus, although security interests other than home mortgages must be disclosed under the Act, Congress was concerned only with interests in property which (i) are intended primarily to satisfy the debt when liquidated upon default and (ii) are of such importance to a borrower that they would realistically influence his decision in shopping for credit. The right to receive unearned premiums is not that sort of interest.[5]

The definition of "security interest" in Regulation Z, 12 C.F.R. § 226.2(gg), also supports this distinction. The

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[4] Respondents argue that Congressman Cahill's and Senator Proxmire's statements should not be considered since they were not "precise" analyses of the amendment. (Resp. Br. 7, n.4). Besides ignoring the substantial weight given by case law to comments by the sponsor of such an amendment as to legislative purpose, Respondents miss the central point that this provision was added from the floor of Congress and was not discussed in the committee reports. These floor statements thus comprise the *only* legislative history available to us in ascertaining the intent of Congress.

[5] Accusing Ford Credit of mischaracterizing its own contract, Respondents argue that the purpose of the assignment provision is to provide additional security for the debt rather than to protect Ford Credit from the risk of uninsured collateral. (Resp. Br. 10, n. 6). This unsupported statement simply is not true. The assignment provision is needed to eliminate the debtor's incentive to cancel the property damage insurance in order to recover the unearned premium.

list of examples set out in the definition all relate to interests designed to secure payment of the debt. The definition does *not* include any example of an interest comparable to the one at issue here, which is, at most, tangentially related to payment of the debt. (Industry Br. 10, n. 20). Therefore, under the doctrine of *ejusdem generis*, the assignment provision should not be regarded as fitting within the definition. Contrary to the Respondents' argument (Resp. Br. 15), courts have applied *ejusdem generis* in cases involving introductory language such as "including, but not limited to . . ." which appears in the Regulation Z definition. *Donovan* v. *United States*, 580 F.2d 1203, 1207 (3d Cir. 1978); *Harrington* v. *Vandalia-Butler Board of Education*, 585 F.2d 192, 195 (6th Cir. 1978); *Austin Co.* v. *United States*, 314 F.2d 518, 520 (Ct. Cl. 1963).

Noting that the annual premium to be paid for property damage insurance in this case was $215,[6] Respondents

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[6] In fact, purporting to rescind the contract, Respondents never paid any insurance premiums. (Rec. Doc. No. 33 at 46). Thus, no unearned insurance premiums ever came into being in this case. Moreover, in any individual case, the average value of the real and fully disclosed security interest—the financed vehicle—dwarfs the relatively *de minimus* interest in unearned property damage insurance premiums. Providing co-equal disclosure of such interests will not aid comparison credit shopping. As noted in an article analyzing the development of Truth in Lending law by the member of the Board's staff principally responsible for its Truth in Lending function:

> *[T]he Board is constantly faced with the conflict between complete disclosure and customer confusion . . . . The more information the creditor discloses, the less the customer may learn about the credit plan.* Consequently, the Board must search for that point at which increased disclosure begins to decrease customer enlightenment.

Garwood, *Truth in Lending—A Regulator's View*, 29 Bus. Law. 193, 199 (1973) (emphasis supplied).

argue that the assignment provision is of substantial importance to consumers and thus ought to be disclosed prominently by lenders. (Resp. Br. 18-20). But this argument proves too much. Under the Act, certain specified terms are required to be disclosed on the "disclosure statement" (*i.e.*, on the face of the contract). Other contractual terms need not be so disclosed, regardless of their importance to the borrower.[7] Respondents' argument would subvert the statutory scheme by requiring disclosure, on the face of the contract, of all arguably important contractual terms.

C. The Legislative History of the Simplification Act Confirms that Congress Intended Not to Require Disclosure of the Assignment Provision.

Ford Credit's initial brief demonstrates that disclosure of the assignment provision is not required under the Truth in Lending Simplification and Reform Act, P. L. 96-221, Title VI, 94 Stat. 168 (the "Simplification Act"). (Ford Br. 19-21).[8] Contrary to the suggestion of Respondents (Resp. Br. 23-24), Ford Credit does not contend that the Simplification Act, which will not become effective until April 1, 1982, directly governs this case. Instead, Ford Credit contends that the Simplification Act provides a "cross light" which clarifies existing law with respect to this issue and helps to determine Congress' original intent

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[7] In *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), for example, this Court rejected the argument that the acceleration clause had to be disclosed on the face of the contract. The acceleration clause, which permits the creditor to declare the full contract balance immediately due and payable, is obviously of much greater importance to consumers than the assignment provision at issue here.

[8] This point is not seriously disputed by the Respondents, although they find it "premature" to consider the issue. (Resp. Br. 25, n. 22).

in requiring the disclosure of security interests. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 411-13 (1972), and cases cited therein.[9]

Apparently conceding that the assignment provision would not have to be disclosed as a security interest under the Simplification Act, Respondents argue that such result reflects a change in the present Act rather than merely a clarification. (Resp. Br. 25-26). In support of their argument, they note that the legislative history contains statements that Congress was intending to simplify and improve the present Act. To be sure, the Simplification Act encompasses many purposes, including both changes in and clarifications of the law in a number of areas. The Board has carefully analyzed the provisions of the Simplification Act in the process of developing implementing regulations which Congress directed the Board to have in place by April 1, 1981. According to the Board's analysis, the effects of the Simplification Act can be put into five categories, including the clarification of "certain complex legal questions that produced conflicting court decisions in the past." Proposed Revision of Regulation Z, 45 Fed. Reg. 80647, 80731 (Dec. 5, 1980). The Board specifically noted that one of the legal issues which was clarified by the Simplification Act is "adequate disclosure of security interests." *Id.* at 80733.[10]

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[9] This Court in *Milhollin* used the legislative history of the Simplification Act as an aid in interpreting the statutory scheme. *See* 444 U.S. at 568. *See also* Comment, *Security Interests in Insurance Proceeds and Unearned Premiums—Have the Courts Gone too Far with Truth in Lending?*, 41 Louisiana L. Rev. 175, 189-91 (1980).

[10] This precise analysis of the effects of the Simplification Act clearly represents the Board's position, as opposed to the ambiguous wording of the press release upon which Respondents rely. (Resp. Br. 18; Resp. Br. Add. 1).

Respondents also attack the reliability of Senator Garn's statement in the Congressional Record quoted in Ford Credit's initial brief (Ford Br. 21), which unequivocally supports Ford Credit's position that the assignment provision was not intended to be disclosed as a security interest under the original Act. Respondents argue that Senator Garn's statement "contradicts" the committee reports as to the purpose of the Simplification Act. (Resp. Br. 27).[11] However, there is no such contradiction. Nothing in the committee reports states or suggests that incidental interests such as the assignment provision at issue here have to be disclosed as security interests under the original Act. The Senate Report on the Simplification Act states quite clearly that such incidental interests are *not* security interests. (Ford Br. 20). Indeed, this distinction was so obvious to the drafters of the Simplification Act (as it must have been to the drafters of the original Act) that they felt it unnecessary to express it in the text of the statute itself, which merely continues the requirement of the present Act that "security interests" must be disclosed. *See* Section 614(a)(9) of the Simplification Act, 94 Stat. 179.

This Court has repeatedly looked to the views of a subsequent Congress to shed light on the intent of the enacting

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[11] As a member of the Senate Committee on Banking, Housing and Urban Affairs and of the Conference Committee which reported the bill which became the Simplification Act, Senator Garn was in an excellent position to assess how the Simplification Act would affect the original Act. This Court in *Milhollin, supra,* 444 U.S. at 567, cited approvingly the remarks of Senator Garn in the Congressional Record with respect to an earlier amendment to the Act. The fact that Senator Garn did not dissent from the Senate Report or the Conference Report suggests that he regarded those reports as being entirely consistent with his strongly-expressed views that certain courts had misinterpreted the Act regarding security interest disclosure.

one. (Ford Br. 22). Ford Credit's interpretation of the relevance of the Simplification Act to the original Act is supported by (1) Senator Garn's statement, (2) the Board's analysis of the Simplification Act, and (3) the Senate Report's distinction between security interests which have to be disclosed and "incidental interests" not requiring disclosure (such as the assignment of unearned insurance premiums). When these factors are considered in conjunction with the purpose of the original Act and the legislative history of the security interest disclosure provision, the inescapable conclusion is that Congress never intended to require disclosure of the assignment provision.

II. THE FEDERAL RESERVE BOARD DOES NOT REQUIRE DISCLOSURE OF THE ASSIGNMENT PROVISION UNDER THE PRESENT ACT AND REGULATION.

In patently inconsistent fashion, Respondents both claim the support of an inapposite early informal interpretation by the staff of the Board,[12] while completely rejecting the authoritative interpretation of the Board's staff contained in proposed Official Staff Interpretation FC-0173 (hereinafter "FC-0173") (Ford Br. Add. 54-57) which is, without question, directly on point. Respondents contend that this Court should not look to FC-0173 because the staff expressed the view that "in light of the Supreme Court's

[12] FRB Public Information Letter No. 377, a 1970 informal staff interpretation relied upon by Respondents as being entitled to "substantial deference" (Resp. Br. 16-17), is entirely distinguishable from the instant case. It involved the financing of a single premium lifetime accidental death and dismemberment insurance policy in which the lender was designated as the owner of the policy during the life of the loan and had the right to apply any premium refund to the loan balance in the event of default. Such interest was not merely incidental or subordinate to some far more significant interest securing payment of the loan.

grant of certiorari [in this case] . . . the staff believes it is inappropriate to take final action on the interpretation at this time." (Ford Br. Add. 58). A letter dated January 23, 1981 from Paul A. Volcker, Chairman of the Board, to AVCO Financial Services, a copy of which is attached hereto as Appendix A, confirms that the sole reason for the deferral of final action on FC-0173 was "because the Supreme Court has agreed to hear a case involving the issue. We simply believe it is more appropriate for us to allow the Court the opportunity to decide the question." The Board's willingness to defer final action on FC-0173 indicates respect for the authority of this Court by an agency which has traditionally shown a reluctance to provide opinions on issues which are in the courts. (Ford Br. 34). Such deference does not represent any retreat from the views expressed in FC-0173.[13]

Respondents also contend that the staff's procedure in proposing FC-0173 for comment before final adoption purportedly demonstrates its tentative nature. (Resp. Br. 30). In fact, however, the staff of the Board on other recent occasions has proposed official staff interpretations (which were later adopted) in exactly the same way. *See, e.g.*, 45 Fed. Reg. 41437 (June 19, 1980) (proposing FC-0172) and 45 Fed. Reg. 62976 (Sept. 23, 1980) (adopting FC-0172).

[13] Respondents attack the motives of the Board by suggesting that it is deferring action on FC-0173 so as to give creditors "a second bite at the apple," and that Board interpretations serve only "to protect creditors from liability." (Resp. Br. 32, n.28). In another incorrect statement, Respondents assert that Ford Credit was required to pay two million dollars to customers under a FTC consent decree involving the proceeds of the sale of repossessed automobiles. (Resp. Br. 13, n.8). In fact, the FTC proceeding was aimed at controlling the repossession practices of certain automobile dealers, and the consent decree did not require Ford Credit to pay any amount to anyone. This type of argument merely reveals the poverty of the Respondents' position.

Rather than indicating any uncertainty on the part of the staff toward such proposed interpretations, including FC-0173, the procedure used of disseminating the proposed official staff interpretation for comment prior to its adoption simply provides a more expeditious method of adopting an interpretation which the Board believes will draw public comment.[14]

A memorandum supplied by the Board to the Solicitor General (which appeared as an appendix to Ford Credit's reply brief in the *Milhollin* case and is attached to this brief as Appendix B) noted that, as of November 9, 1979, all of the 167 official staff interpretations proposed under the Act had been adopted without any substantive change despite reconsideration of some interpretations following public comments. *See* A-4, *infra*. The five proposed official staff interpretations promulgated since November 9, 1979 have similarly been adopted without substantive change. Given the virtually unbroken history of adoption, without substantive change, of official staff interpretations as they were originally proposed, there is no basis whatsoever for Respondents' contention that proposed but unadopted official staff interpretations have "no meaning" and are nothing more than "lightning rods for public comment." (Resp. Br. 29).

Since FC-0173 has not yet been adopted, Ford Credit cannot rely upon it as establishing a complete defense under 15 U.S.C. § 1640(f). The Board was obviously referring to such defense when it stated in the mailing cited by Re-

[14] The alternative procedure requires the following steps: (1) publication of a proposed interpretation without requesting comments; (2) suspension of the interpretation when a request for comment is received; (3) republication of the interpretation with the public expressly invited to comment; and (4) adoption of the interpretation. 12 C.F.R. § 226.1(d)(2).

spondents that FC-0173 "may not be relied upon until final action is taken." (Resp. Br. Add. 3). However, a proposed agency interpretation such as FC-0173 is entitled to such persuasive weight as is evident from the thoroughness of its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. *GTE Sylvania* v. *Consumer Product Safety Commission,* 598 F.2d 790, 801-802 (3d Cir. 1979), *aff'd,* 447 U.S. 102 (1980), *citing Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944); *see also United States* v. *Exxon Corp.,* 87 F.R.D. 624, 630-33 (D.D.C. 1980); *Harris* v. *Brown,* 470 F. Supp. 250, 253 (W.D. Mo. 1979). In considering and drafting FC-0173, the Board's staff had the benefit of the Congressional hearings which led to adoption of the Simplification Act, the Board's on-going revision of Regulation Z and the numerous judicial decisions on this issue. FC-0173 is thus entitled to great weight as reflecting the staff's considered judgment that the assignment provision need not be included in the disclosure statement.

III. A DECISION BY THIS COURT REQUIRING DISCLOSURE OF THE ASSIGNMENT PROVISION SHOULD BE GIVEN ONLY PROSPECTIVE APPLICATION.

Lenders throughout the nation, acting in good faith to comply with the Act, have not regarded the assignment provision at issue here as a "security interest" required to be disclosed as such under the Act.[15] Substantial injustice

[15] Although Respondents cite one isolated example of a lender who disclosed an interest in insurance premium refunds as a security interest (Resp. Br. 39), the Industry *Amici* demonstrate that the uniform practice of the credit industry has been not to treat such interests as "security interests". (Industry Br. 8, n.13). *See also* Edmonds and Taylor, *Truth and Consequences,* 35 Wash. & Lee L. Rev. 367, 388-89 (1978).

would result if a ruling requiring disclosure of the assignment provision, which was not clearly foreshadowed, were applied retroactively to the millions of outstanding contracts which contain such provisions on their reverse sides. Therefore, under the guidelines set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), Ford Credit urges that any such ruling be made prospective only.

Respondents contend that this Court should not grant prospective relief in this case because (a) no case or controversy is presented (Resp. Br. 32-34) and (b) the Act preempts the *Chevron* doctrine (Resp. Br. 35-37). Neither contention is valid. Respondents' professed concern that there is no "adversary relationship" on this issue is belied by the vigorous confrontation of opposing views expressed in the briefs filed herein. Since the Court has power to grant relief prospectively except for Respondents, *Stovall* v. *Denno*, 388 U.S. 293, 301 (1967), surely Ford Credit is entitled to ask the Court to exercise such power in this case. Otherwise, the Court would be deprived of the effective advocacy the "case or controversy" rule serves to promote.

Respondents' argument that the Act preempts the equitable doctrine of prospective relief is equally specious. No court has held that the Act preempts the doctrine of prospective relief or that prospective relief can never be proper in a Truth in Lending suit. Indeed, as noted in our initial brief, prospective relief has been granted in several cases under the Act in order to avoid unfairly harsh impacts on lenders. (Ford Br. 43-44). Respondents repeatedly assert that prospective relief is inappropriate because of the one year statute of limitations under the Act. (Resp. Br. 35, 38, 44). However, in most states, including Illinois, debtors are permitted to assert counterclaims or setoffs based on the Act despite the expiration of the one-year

limitations period.[16] Thus, retroactive application of an adverse decision on this issue would expose lenders to liability in connection with all outstanding credit transactions, even those entered into several years ago.

During the first seven years that the Act was in force, there were no reported decisions dealing with this issue. Accordingly, Respondents' suggestion that the credit industry could have requested an opinion from the Board to resolve this issue without litigation (Resp. Br. 43, n.40) is disingenuous. Prior to the onset of litigation, the credit industry had no inkling that this issue existed. After the litigation commenced, it was difficult to obtain an interpretation from the Board because of its long-standing reluctance to become involved in pending private litigation. (Ford Br. 34).

Application of the *Chevron* guidelines requires a weighing of the equities. On the one hand, consumers are not injured in any way by virtue of the placement of the assignment provision on the back rather than the front of credit contracts. Although actual damages are permitted for violations of the Act, 15 U.S.C. § 1640(a)(1), this provision is very rarely used since such damages are virtually never incurred. The Respondents themselves have not sought to recover any actual damages. (J.A. 4). On the other hand, creditors have gained no economic benefit from having the assignment provision on the back of the contract, as opposed to the front. It would be fundamentally unfair to impose potentially enormous penalties on the consumer credit industry for what is, at worst, a purely technical violation of the Act.

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[16] Cases in which state courts have held that a Truth in Lending Act counterclaim may be asserted after the one year statute of limitations period are compiled in *Plant* v. *Blazer Financial Services, Inc.*, 598 F.2d 1357, 1364 n.13 (5th Cir. 1979).

Respondents attempt to belittle the losses which the credit industry would incur from retroactive application of an adverse decision by comparing Ford Credit's potential liability from the lawsuits *now* pending against it with Ford Credit's total assets. (Resp. Br. 45-46). Such comparison is totally misleading. It can be expected that the number of suits and counterclaims alleging a violation of the Act will increase dramatically if this case is decided adversely to Ford Credit. Contrary to Respondents' characterization, the credit industry does not regard the costs of such litigation (including statutory damages, court costs and attorneys' fees) as "paltry". (Resp. Br. 46; *cf.* Industry Br. 6-7).[17]

Finally, Respondents seek to bar Ford Credit from receiving equitable relief on the theory that it took a "conscious gamble" in not changing its contract form nationwide immediately following the Fifth Circuit's decision in *Edmondson* v. *Allen-Russell Ford, Inc.*, 577 F.2d 291 (5th Cir. 1978), *cert. denied*, 441 U.S. 951 (1979). (Resp. Br. 43). Yet, that argument would require credit industry forms to be rewritten at the slightest shifts in judicial currents in this complex and ever-changing area—a process very expensive to the industry and ultimately to the consumer. (Industry Br. 5-6). In light of the purposes of the Act, its legislative history, applicable interpretations of the Board, and the custom and usage in the credit industry, Ford Credit has more than reasonable grounds for believing that its position on the merits of this issue is correct and for refraining from modifying its nationwide contract form pending a more authoritative judicial de-

[17] The credit industry as a whole, and Ford Credit in particular, are not so strong financially as to be able to absorb such massive costs easily. Ford Credit, for example, is a wholly-owned subsidiary of Ford Motor Company, which lost over $1.5 *billion* in fiscal 1980. The Wall Street Journal, Feb. 20, 1981, at 4, col. 1.

termination of this issue. Thus, even if this Court were to disagree with Ford Credit's position on the merits, a prospective-only ruling would be appropriate under all of the circumstances of this case.

CONCLUSION

For the reasons stated above, Petitioners respectfully request the Court to reverse the judgment of the Court of Appeals below.

Respectfully submitted,

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Schiff Hardin & Waite

Appendices

APPENDIX A

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

PAUL A. VOLCKER
CHAIRMAN

January 23, 1981

RECEIVED
JAN 29 1981
LEGAL DIVISION

Mr. Charles Krugmeier
Assistant Vice President
and Counsel
AVCO Financial Services
620 Newport Center Drive
Newport Beach, California 92660

Dear Mr. Krugmeier:

I have read your letter asking the Board to issue an interpretation of Regulation Z on credit life insurance. As you know, we proposed to take the position you favor, but have delayed final action on the interpretation because the Supreme Court has agreed to hear a case involving the issue. We simply believe it is more appropriate for us to allow the Court the opportunity to decide the question.

I appreciate your point that property and credit life are two different types of insurance. However, while the distinctions you draw are valid, our view is that property and credit life insurance involve the same basic issue for purposes of Truth in Lending.

As you probably know, under the Truth in Lending Simplification and Reform Act, the whole issue about disclosing these insurance refunds and benefits disappears. It's clear in both the statute and the proposed regulation that no disclosure will be required in the future. Although not an immediate solution, at least the problem you are concerned about won't persist forever.

Sincerely,

Paul A. Volcker

APPENDIX B

Memorandum.

BOARD OF GOVERNORS
of the
FEDERAL RESERVE SYSTEM

Date November 9, 1979
Office Correspondence
To Neil Butler and
Dolores S. Smith
From Lynne B. Barr
Subject: Issuance of Official
Staff Interpretations

As requested by the Justice Department, this memorandum is a brief summary of internal procedures employed by the Division of Consumer and Community Affairs from 1976 to the present with respect to official staff interpretations (OSIs) of Regulations B and Z. Many of these procedures were not changed when procedures for delayed effective dates and comment periods were adopted in 1978, and you can assume they are still in place unless I indicate otherwise.

It should be noted that the statutory provisions in question permit the Board to authorize any "official or employee of the Federal Reserve System" to issue interpretations or approvals under the regulations. One alternative available to the Board in 1976 was to authorize non-official staff members of the Board or other officials or employees of the System (such as Federal Reserve Bank personnel) to issue the interpretations. That course was not recommended by the staff to the Board because we felt that the interpretations should be uniform and should involve a relatively high level of review.

When the Board considered the designation of officials several Board members expressed concern about control and review of the interpretations. For that reason, a number of procedures were adopted by the Board. The first is the mandatory review of all OSIs by two officials of the Division. Each OSI is reviewed and initialed by one official before it is reviewed and signed by the official whose signature the letter bears.

Second, the Board decided that all OSIs would be reviewed quarterly by the Consumer Affairs Committee (the committee of Board members with oversight responsibility over the Division of Consumer and Community Affairs). At the time FC-0054 was issued, the Committee members reviewed the letters themselves. They now receive a summary of the letters.

Third, written internal procedures for preparation and issuance of the OSIs and unofficial interpretations were developed and circulated to all staff members. A copy of these procedures is attached.

The letters were and continue to be prepared in the following way. A request for an OSI is acknowledged and then assigned to a staff attorney for response. If the request appears incomplete or relevant documents were not included in the original request, the attorney will ask the requesting party for further information. A draft response to the letter is prepared, usually in consultation with other staff attorneys, section chiefs, and officials. An initial determination is made at that time whether or not the response should be official. This draft is often reviewed and discussed in group meetings with officials, section chiefs, and staff attorneys familiar with the subject matter. The letter is then issued after further review by the staff attorney's section chief and two officials.

As you know, OSIs were originally effective upon publication in the *Federal Register*, with provision for reconsideration upon request. One hundred forty-seven OSIs under Regulation Z and 10 under Regulation B were issued under this procedure. Of the Regulation Z OSIs issued between August 1976 and April 1978, approximately 6 were reconsidered, either by the Consumer Affairs Committee or the Board. None were changed.

In April 1978, the Board amended the procedures to provide a delayed effective date and a period for public comment if reconsideration of an OSI was requested. Of the 20 OSIs of Regulation Z issued since April 1978, 9 have been reconsidered; none were substantively changed as a result of the reconsideration and public comments.

Attachment
cc: Janet Hart

PROCEDURES FOR ISSUANCE OF INTERPRETATIONS OF REGULATIONS Z AND B

FAIR CREDIT PRACTICES SECTION
EQUAL CREDIT OPPORTUNITY SECTION

The purpose of this memorandum is to describe the procedures to be employed by staff of the Fair Credit Practices and Equal Credit Opportunity sections of OSCA in processing requests for Board interpretations and official staff interpretations of Regulations Z and B, and for issuance of unofficial staff opinion letters on those Regulations. Under these procedures, which are set forth in § 202.13(b) and (c) of Regulation B and § 226.1(c) and (d) of Regulation Z, there will be three kinds of interpretations of Regulations Z and B: (1) official Board interpretations, (2) official staff interpretations, and (3) unofficial staff interpretations. The procedures become effective July 30, 1976. A copy of the amendments to the Regulations is attached.

I. *Types of Interpretations*

1. *Formal Board interpretations* will continue to be issued only in response to those requests which involve "potentially controversial issues of general applicability which concern substantial ambiguities in the Regulations and raise significant policy questions." Board interpretations are published in the *Federal Register.*

2. *Official staff interpretations* will be issued in response to those requests which, in the opinion of one or more officers of OSCA, require clarification of technical ambiguities in the Regulation or which

have no significant policy implications. The official staff interpretations will be published in the *Federal Register*, with identifying details deleted. See Attachment A for examples.

3. *Unofficial staff interpretations* will be issued where the person making the request does not require the protection of the Act, where the issue is minor or has already been satisfactorily resolved, or where time strictures mandate a rapid response. These letters are not published in the *Federal Register* but may become part of the Board's Public Information file, depending on the significance of the opinion expressed therein. See Attachment B for examples.

II. *Processing of Requests*

Requests for interpretations of the Regulations will normally be addressed to the Director of OSCA. Letters addressed to other officials or employees of the Board, however, will also be considered as formal requests (if the nature of the request so indicates) and the same requirements will apply. All requests received in OSCA will be logged in, routed through the section chiefs of FCP and ECOA and assigned to individual staff members.

The assigned staff member will examine the request to determine that it contains a complete statement of all relevant facts, that all pertinent documents are included and properly incorporated and that the request states the specific provisions of the statute and Regulation which are at issue. If the request for interpretation is incomplete the staff member should either (1) acknowledge the request by mail and ask for more information, or (2) request the additional information by telephone. If by telephone, the person making the

request for interpretation should be asked to supply a copy of such additional information by mail in order to compile a complete written record of the relevant facts. It should be noted that while certain requirements for requests for interpretations are set forth in the Regulations (§ 226.1(d)(1) and § 202.13(c)(1)), these requirements are not inflexible and noncompliance with them should not be used to delay a request if the statement contained in the request is complete.

If the request for interpretation is complete (or upon receipt of the requested additional information), the staff member has five working days within which to make a recommendation to the section chief as to what type of response should be given. An initial determination as to the proper response will be made by the staff member and the section chief at that time. Within 15 days of the *receipt of the complete request by OSCA*, a substantive response will be sent to the person making the request or an acknowledgement will be sent which sets a reasonable time within which a substantive response will be given. Except in the most unusual cases. sixty days from the time a request is complete should be a sufficient amount of time in which to answer a request.

A discussion of the different types of interpretations, the criteria to be used in issuing such interpretations and varying procedures for their issuance is set forth below.

1. *Official Board interpretations* are formal interpretations of regulations issued only by the Board of Governors. They will be issued only upon those requests which involve "potentially controversial issues of general applicability which concern substantial ambiguities in the Regulations and raise significant policy questions."

When a determination is made by the staff member and section chief that a particular request poses issues of such significance that a formal Board interpretation may be desirable, the OSCA officials should be apprised of the issues. If the officials decide to recommend to the Governors' Committee that such an interpretation be issued by the Board, a draft Board memorandum should be prepared. The memorandum should state the issue involved and the reasons why the present status of the Regulation is inadequate to resolve the issue, and should suggest an approach to be taken in an official Board interpretation. This memorandum need not be accompanied by draft *Federal Register* material. If the Governors' Committee determines that an interpretation is necessary, the Board memorandum and *Federal Register* material will be prepared.

All official Board interpretations, except those which clearly deal with noncontroversial or technical issues, will be published for comment in the *Federal Register* before being issued in final form. See Attachment C for an example.

The *Federal Register* material for such interpretations should contain a docket number (issued by the Secretary's Office), a discussion of the substance of the interpretation and a statement that the interpretation is being issued for comment by the Board in order to assure an informed decision-making process. The comment period will be 30 days. The interpretation will become effective 60 days after issuance for comment (30 days after the close of the comment period) without further action by the Board, unless significant comments have been received. If such comments have been received, the section staff and OSCA officials will make recommendations to the OSCA Governors' Committee as to what changes, if any, should be made.

If the interpretation remains unchanged a *Federal Register* notice should be published, before the original effective date, which discusses the comments and states the Board's reasons for issuing the interpretation in final form as it was originally proposed. This notice would require Board action, usually on the consent calendar.

If the comments indicate and OSCA staff agree that the interpretation should be changed, a Board memorandum and *Federal Register* material outlining the changes and the reasons therefor should be prepared in advance of the original effective date and submitted through the OSCA Governors' Committee to the Board for approval. If the Board cannot act on the proposal before the original effective date, a notice postponing the effective date until further notice should be published in the Register (see p. 43 of FR *Document Drafting Handbook* for example). The interpretation will then be issued in final form in the *Register*. In most cases, the effective date should be delayed 30 days, but the delay can be waived in certain cases (5 U.S.C. § 553(d)).

2. Official staff interpretations will be issued in response to requests which require clarification of technical ambiguities in the Regulation or which have no significant policy implications. They are expected to be the bulk of the responses made by OSCA to requests for interpretation, and will generally cover, with some restriction, the same range of issues as the present Public Information Letters. They will be published in the *Federal Register*, with identifying details deleted, although such identification can be obtained through the Board's Public Information Office.

The staff member to whom the request has been assigned will decide, in conjunction with the Section

Chief, if the request should be answered with an official staff interpretation. If so, the letter will be drafted. Each letter should contain a complete recitation of the facts as they were presented in the request, and a statement that the response is based on only those facts. The letter should be approved by section level personnel and forwarded to (1) a designated official of OSCA who will approve and *initial* the interpretation, *and* (2) to the designated official who will both sign the letter and initial it. Each letter will be initialed by two OSCA officials.

Every official staff interpretation must contain the following statement denoting its status:

> This letter is an official staff interpretation of Regulation B(Z), issued, in accordance with § 202.13(c)(3) (§ 226.1(d)(3)) of the Regulation.

In most cases, the letter will be sent after it is signed to the person making the request, and a copy will be sent to the *Federal Register* for publication. The *Federal Register* material should be prepared as a rules document (see p. 12 of *Document Drafting Handbook* and Attachment C for an example), but without an explanatory preamble or a docket number (except when issued for comment). Each letter should have a short explanatory headnote (no more than two sentences).

Staff is encouraged to publish two or more staff interpretations within the same notice to avoid duplication of resources. The effective date does not need to be delayed as these interpretations are subject to the exception in 5 U.S.C. § 553(d) for interpretative rules. Staff interpretations should be numbered consecutively in the following manner: *Regulation B—12 CFR*

Part 202, EC-0001; Regulation Z—12 CFR Part 226, FC-0001.

Certain official staff interpretations will be published for comment prior to their effective date. When a request for interpretation poses a novel or controversial question which is not of sufficient importance to warrant a Board interpretation but would be subject to differing views by interested parties, the interpretation should be published for comment in the *Register*. The inquiring party should be notified that the interpretation is being published for comment before being issued in final form. The procedures to be followed for such publication are identical to those used for official Board interpretations (see page 4), except that the staff interpretation will be written as a letter response to a request and will be approved by two OSCA officials. Comments received on the proposal will be reviewed by staff, and OSCA officials will approve the final form of the interpretation.

The OSCA Governors' Committee will review all official staff interpretations on a quarterly basis and each section chief will be responsible for providing the Director of OSCA with a complete reading file of official staff interpretations, normally within 15 days after the end of the quarter.

3. *Unofficial staff interpretations* will be issued by OSCA staff in those cases where the protection of the Act is neither requested nor required or where a speedy response is required. These letters will usually be issued in the following cases:

1. The question has been satisfactorily answered in the past by an official letter or by a Public Information Letter, which has not been given

official status and which does not warrant such status.

2. The request involves narrow issues that do not affect a significant number of creditors.
3. The person making the request requires a rapid response.
4. The person making the request does not seek the Act's protection.
5. The request for official staff (or Board) interpretation is answered in the negative.

The staff member, in conjunction with the section chief, will determine that a request should be answered with an unofficial interpretation. The letter will be drafted, approved and signed by the section chief or the staff member. Each letter which responds to a request for an official interpretation should contain an explanation of the reasons why an unofficial interpretation has been issued instead. Generally, the reasons for denial can be couched in the language of the Regulation (see § 202.13(c)(4) and § 226.1(d)(4)).

Every unofficial staff interpretation must contain the following statement denoting its status:

> This is an unofficial staff interpretation of Regulation B(Z).

Unofficial interpretations will be sent to the person making the request and will, if the material contained in the letter is of sufficient interest, become part of the Public Information file.

4. *Reconsideration of official staff interpretations* by the Board may occur upon request of interested parties. Requests for reconsideration must be made

within 30 days of final publication in the *Register* and will be addressed to the Secretary of the Board. The request for reconsideration must be granted or denied within 15 days of receipt or an acknowledgement sent which sets a reasonable time within which a response will be given. OSCA staff of the relevant section and officials will study the request and make an independent recommendation to the OSCA Governor's Committee. The person who made the original request for interpretation, if different from the person requesting reconsideration, should be contacted informally concerning the request for reconsideration, and an opportunity given to that person to comment upon it prior to the Committee's decision. The Committee will decide whether or not to grant the request for reconsideration.

If the request is denied, a response, signed by the Secretary and drafted by OSCA staff, which states the reasons for the denial, will be sent to the person making the request.

If the request for reconsideration by the Board is granted, staff will prepare a Board memorandum. If the Board determines that the staff interpretation should remain unchanged, the person making the request will be so notified by a letter from the Secretary which has been drafted by OSCA staff. If a decision is made by the Board that the interpretation should be changed, the new interpretation will be drafted by OSCA staff, signed and initialed by OSCA officials and should be published in the *Federal Register*, with a notice which rescinds the previously issued interpretation. The person who made the original request for interpretation should be notified by OSCA officials of the action taken.

APPENDIX C

Subsidiaries of Ford Motor Company.

DOMESTIC AFFILIATES

Ford Credit — Canada Limited
Ford Motor Credit Company International
The American Road Insurance Company
Ford Life Insurance Company
Vista Insurance Company
Vista Life Insurance Company
American Road Services Company
American Road Equity Corporation
Ford Consumer Credit Company
Ford Motor Credit Company of Iowa
Ford Consumer Discount Company
Philco Finance Corporation
Canadian Road Credit Company, Limited
Ford Credit Equity Corporation
Ford Motor Company (Delaware)
Eveleth Taconite Company (Delaware)
Ford Products Company (Delaware)
Ford Communications, Inc. (Delaware)
Environ Inc. (Delaware)
Ohio Production Corporation (Delaware)
Predelivery Service Corporation (Delaware)
Ford Export Corporation (Delaware)
Ford Motor Land Development Corporation (Delaware)
Detroit Downtown Development Corporation (Delaware)
Ford Motor Properties, Inc. (Delaware)
Greenfield Properties, Inc. (Delaware)
Ghia, Inc. (Delaware)
Rise Services Incorporated (Delaware)
Dearborn Capital Corporation (Delaware)
Ford Leasing Development Company (Delaware)
Manhattan Ford, Lincoln-Mercury, Inc. (Delaware)

Ford Motor Dealership Facilities Company (Delaware)
Parklane Insurance Company (Michigan)
Ford Aerospace and Communications Corporation (Delaware)
Logistic Services Corporation (Delaware)
Aeronutronic Overseas Services, Inc. (Delaware)
Aeronutronic Services Corporation (Delaware)

FOREIGN AFFILIATES

Compania Financiera de Inversiones Y Credito S.A. (Argentina)
Ford Credit Australia, Limited
Ford Credit Australia Wholesale, Limited
Ford Credit N.V. (Belgium)
Ford Financiadora S.A. (Brazil)
Ford Distribuidora Ltd. (Brazil)
Ford Credit A.S. (Denmark)
Credit Ford S.A. (France)
Ford Credit Bank AG (Germany)
Henry Ford & Son (Finance) Limited (Ireland)
Ford Credit S.p.A. (Italy)
Ford Finance Company of Japan, Limited (Japan)
Ford Credit B.V. (Netherlands)
Ford Motor Credit Company of New Zealand, Ltd.
FCP Finance Corporation (Philippines)
FCP Credit Corporation (Philippines)
Ford Credit South Africa (Proprietary) Limited
Ford Credit S.A. (Spain)
For Leasing S.A. (Spain)
Ford Credit A.B. (Sweden)
Ford Credit S.A. (Switzerland)
Ford Motor Credit Company, Limited (United Kingdom)
Automotive Finance Limited (United Kingdom)
Ford Financial Trust Limited (U.K.)
Ford Motor Compania Comercial, S.A. de C.V. (Mexico)

Ford International Capital Corporation (Delaware)
Ford International Finance Corporation (Delaware)
Transcon Insurance Limited (Bermuda)
Ford Motor Company Caribbean, Inc. (Puerto Rico)
Fordson Coal Company (Delaware)
Ghia, S.p.A. (Italy)
Ford Latin America, S.A. de C.V. (Mexico)
Philco Corporation of Canada, Limited
Philco Radio E Televisao, Ltda (Brazil)
Philco Da Amazonia, Ltda (Brazil)
Philco Industria Brasileira de Semiconductores, Ltda. (Brazil)
Philco Gmbil (West Germany)
Dearborn Capital Corporation (Delaware)
Ford Motor Company of Canada, Limited
Ford Motor Company of Australia Limited
Ford Sales Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private, Limited (Singapore)
Ford Motor Company of South Africa (Proprietary) Limited (South Africa)
Ensite Limited (Canada)
Essex Manufacturing (a Partnership) (Canada)
Mariveles Stamping Plant Branch (Philippines)
Ford Lio Ho Motor Company, Ltd. (Taiwan)
Ford Asia-Pacific, Inc. (Delaware)
Ford Philippines, Inc. (Philippines)
Ford Motor Company (Japan) Ltd. (Japan)
Ford Motor Company of Malaysia, Sdn. Bhd. (Malaysia)
Japan Automatic Transmission Company, Ltd. (Japan)
Ford Motor Argentina S.A. (Argentina)
Metalurgica Constitucion S.A. (Argentina)
Transax, S.A. Commercial Industrial Y Financiera (Argentina)

Plan Ovalo S.A. (Argentina)
Ford Motor Company S.A. (Mexico)
Ford Motor Company del Peru, S.A. (Peru)
Ford Motor Company del Venezuela (Venezuela)
Productos Industrailes, C.A. (Venezuela)
Ford Brasil, S.A. (Brazil)
Sao Francisco, Ltda Maquinas E Ferramentas (Brazil)
Bongotti S.A. Industria E. Comercio de Radiadores (Brazil)
Ford Administracao e Consorcios Ltda (Brazil)
Transglobal-Corretagem de Seguros, Ltda (Brazil)
Ford (Uruguay) S.A. (Uruguay)
Ford Mid-East and Africa, Incorporated (Delaware)
Ford Motor Company (Egypt) S.A.E., Alexandria (Egypt)
Ford Motor Company, Limited (England)
Ford Tractor (Belgium) Limited (Belgium)
Henry Ford & Son, Limited (Ireland)
Henry Ford and Son (Sales) Limited (Ireland)
Dagenham Motors Limited (England)
Ford Personal Import Export, Ltd. (England)
Ford-Werke AG (Germany)
Genk, Belgium Branch
Saar-Industrie, Gmbil (Germany)
Ford Verisicherungs Vermittlungs, Gmbil (Germany)
Ford Motor Company (Austria) K.G. (Austria)
Ford-Versorgungs-und-Unterstutzungseinrichtung-Gmbil (Germany)
Ford Investitions-Gmbil (Germany)
Ford Investitions-Gmbil & Co. oHG (Germany)
Ford Espana, S.A. (Spain)
Ford Leasing S.A. (Spain)
Ford of Europe Incorporated (Delaware)
Ford Motor Company (Belgium) N.V. (Belgium)
Ford Motor Company (Switzerland) S.A. (Switzerland)

Ford Motor Company A/S (Denmark)
Ford Motor Norge A.S. (Norway)
Eik and Hausken A/S (Norway)
O/Y Ford A/B (Finland)
Ford France S.A. (France)
Ford Italiana S.p.A. (Italy)
Ford Lusitana S.A.R.I. (Portugal)
Ford Motor Company Aktiebolag (Sweden)
Ford Nederland N.V. (Netherlands)